IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

NO. 77-419

HOUSTON BELT & TERMINAL RAILWAY COMPANY, *Appellant*

v.

JOE W. WHERRY, *Appellee*

On Appeal from Texas Court of Civil Appeals First Supreme Judicial District

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REPLY TO JURISDICTIONAL STATEMENT

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SUBJECT INDEX

LIST OF AUTHORITIES

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STATEMENT OF THE NATURE AND RESULT OF THE CASE

This is a libel action and the opinion of the Court of Civil Appeals correctly sets forth the nature and result of the case. *See* Appellant's Appendix B.

STATEMENT OF THE CASE

The Court of Civil Appeals' opinion correctly states the facts of this case. Appellant's jurisdictional statement omits some critical facts which are discussed below.

Because Appellant's union felt that Appellee should not be allowed to return to his job with full seniority after a tour of duty with the military, the Department of Labor had to intervene in order to get Appellee reinstated as a switchman with full seniority. That reinstatement created a dispute between Appellant's management and the Union. During this controversy Appellee received his very minor injury on July 14, 1972.

Dr. Robins, Appellant's company doctor, requested a Drug Screen Urinalysis on the day of injury. The test on Appellee's sample was run three days later as a part of a large number of other samples which were stockpiled from a methadone testing program being conducted at the hospital. No physician conducted the tests; they were conducted by technicians in the laboratory. (S.F. 18)

Dr. Robins received Plaintiff's Exhibit 1 which noted a trace of methadone in the urine. He telephoned Mr. Montgomery, one of Appellant's officers, passed on this information to him, and told him that he couldn't say that this meant anything, but that it might bear further testing and investigation. (S.F. 28) The doctor stressed that he came to no conclusion and offered no medical opinion about the result of the test. (S.F. 34-35)

Following this telephone conversation Mr. Montgomery wrote and circulated Defendant's Exhibit 1 which stated "laboratory results of the urine specimen was positive for methadone, which is a synthetic drug commonly used in the withdrawal treatment of heroin addicts." That statement was clearly libelous. It charged Appellee with taking or using methadone and implied that he was a heroin addict. Under Article 725c, §§ 2-4 of the Texas

Penal Code in effect in 1972, it was a felony punishable by detention in the penitentiary to habitually use, be addicted to, or be under the influence of narcotics in any way. The Act included methadone and heroin.

Mr. Montgomery's letter addressed to the officers of Appellant indicated on the exhibit failed to reflect that, at most, a "trace" was found and that Dr. Robins had told him this test was not definitive and further investigation would have to be conducted before he could form an opinion from this test. The implication of Mr. Montgomery's letter was plain and it was false.

The effects of the language of Mr. Montgomery's letter could have been easily predicted. The same day that Mr. Montgomery circulated this letter, Mr. B. R. Adams refused to allow Appellee to return to work following his release by Dr. Robins, and notified him in writing that he was being withheld from service pending an investigation.

It is obvious that Mr. Adams understood Mr. Montgomery's letter to plainly state that Appellee was using or was under the influence of narcotics while on duty which, if true, would have furnished justification for his being withheld from service pending investigation. In this case, it would have been a violation of the agreement between Union and Appellant to withhold Appellee from service pending investigation if he had not been in violation of Railroad Rule "G", or using or under the influence of narcotics. It is significant that Mr. Montgomery testified at trial that Dr. Robins never told him, or anybody else at the Railroad, to his knowledge, that Appellee was a drug user, addict or under the influence of drugs or narcotics. (S.F. 104)

Following the receipt of the narrative report from Dr. Robins, which was mailed on July 24, 1972, Appellants notified Appellee of a formal investigation against him to investigate the facts of his accident. (PX-6) The Railroad did not openly charge Appellee with violation of Rule G, but failed to return him to work pending the investigation. At the investigation Appellant's officers read the doctor's reports and Montgomery's memorandum.

This was Appellee's first knowledge that he was being branded a drug user and he went directly from the investigation to the Toxicology Laboratories of Houston to be examined thoroughly so that he could demonstrate clearly to the Railroad that he was not a drug user.

Dr. Spikes of Toxicology Laboratories tendered his report clearing Appellee of using methadone or any other commonly known drug of abuse. This test and result supported Appellee's sworn evidence that he had *never* used methadone or any other narcotics. The report of those tests was received by Appellant two days before they fired him, ostensibly for being injured on Friday and not acquiring an accident report until Monday, even though the Claims Office was closed on Saturday afternoon and Sunday. They claimed they also fired him for being an unsafe employee since he bumped his knee and cut his eye and for other innocuous general rules of conduct. It is a clear inference from the record that the Railroad, both Union and Management, wanted rid of Appellee and used a subterfuge to accomplish that goal—finally resorting to libelous accusations known to be false to back up their scheme. According to the record, the last information received by the Belt in connection with this matter was Dr. Spikes' report. However, DX-5, which was not admitted into evidence, bears a date of August 10, 1972. It is the last claimed information received by the Appellants concerning methadone. The record in this case is devoid of any claim that Appellants ever acquired any more information or did any further investigation after August 10, 1972.

This is extremely important in light of the evidence given by Montgomery and Minahan, another officer of Appellant. It is also very important in regard to the August 23, 1972 letter written by Mr. Minahan to the Department of Labor. All of the facts upon which Mr. Montgomery and Mr. Minahan based their sworn testimony about Appellee's use of methadone were gathered no later than August 10, 1972.

It is necessary at this point to skip ahead in time to January 26, 1973, when Mr. Minahan swore on his deposition that the records he had did not indicate that Appellee could be charged with being a drug user or drug addict or being under the influence of drugs. (S.F. 244) Mr. Minahan also swore that it would be incorrect to say that Appellee was fired because of a Rule G violation and that he was under the influence of drugs or used drugs.

Then, in January, 1976, at the trial of this case, Mr. Montgomery swore that it would not have been "in good faith" to have accused Appellee of being a narcotics user. (S.F. 75-76) Mr. Minahan testified at the trial that it would have been false for anyone to have charged Appellee with being a drug user. (S.F. 116) He swore that he always maintained it would have been false to suggest that this man was in violation of Rule G. (S.F. 122)

Dr. Robins swore on his deposition and at the time of trial that he did not intend to brand Appellee as a drug user and that if someone else had made an accusation against him based upon what Dr. Robins knew, that he would have defended Appellee against such an accusation. (S.F. 68-69)

With this background, a review of the letter which Mr. Minahan sent to Merle Rider at the Department of Labor on August 23, 1972 is in order. Thirteen days before Mr. Minahan wrote the letter he had available to him all of the information that he ever acquired in this matter. Based upon this information Mr. Minahan later swore at trial that it would be false to accuse Appellee of being a drug user or being in violation of Rule G, but Mr. Minahan wrote as follows:

> "It was also *determined by the doctor who examined Mr. Wherry following his injury, caused when Mr. Wherry passed out and fell, that traces of methadone were present in Mr. Wherry's system,* which constitutes grounds for discharge under Uniform Code of Operating Rules, Rule 'G'." (emphasis added)

Dr. Robins *never* determined that methadone was present in Appellee's system since he didn't run the test or make the report. Nor did he ever tell Appellant that the test run established the presence of methadone. It is obvious that Mr. Minahan knew these statements were false in light of his later testimony based upon the knowledge he had acquired prior to writing this letter. Mr. Minahan claimed in the other portions of the letter that the Belt had fired Appellee for some inconsequential rule violations. However, he gratuitously added this paragraph

which contained the libel, which he knew to be false, and which exhibited actual malice.

The jury found and was well justified in finding that Appellee had been falsely and maliciously libeled and has suffered substantial damages.

THE QUESTIONS RAISED BY APPELLANT WERE NOT PROPERLY PRESENTED OR PRESERVED IN THE STATE COURT SO THAT THE LOWER COURT'S DECISION IS SUPPORTED BY AN ADEQUATE, INDEPENDENT STATE GROUND.

Appellant asserts that the case at bar was submitted pursuant to the Texas Libel Statute, Tex. Rev. Civ. Stat. Ann., Article 5430 (1958), as a strict liability action (no fault required). Such claim is wrong and because it is wrong, Appellant presents no issue for this Court to review. This case was tried and decided on the issue of actual malice in connection with the libel proved. Appellant published defamatory, false material with knowledge of the falsity or at least "with reckless disregard of whether it was false or not." *New York Times Co. v. Sullivan,* 376 U.S. 254 (1964). The standard of fault in this case was malice, not merely negligence. Any objection Appellant may have had to the definition of malice used in the charge to the trial court was waived by Appellant's failure to meet the clear, reasonable, procedural requirements of the Texas Rules of Civil Procedure. Therefore, there is an adequate state ground for affirmance. *Henry v. Mississippi,* 379 U.S. 443 (1965).

The Texas Libel Statute, quoted in full in Appellant's jurisdictional statement, is merely a definition of libelous

material. The post-*Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1975), decisions in Texas make it clear that Texas Courts have not ignored this court's holding that a system of strict liability for defamation can contravene the First Amendment. In *Foster v. Laredo Newspapers, Inc.*, 541 S.W.2d 809 (Tex. 1976), cert. denied, 45 U.S.L.W. 3562 (U.S. Feb. 22, 1977), the Texas Supreme Court joined the majority of state courts that have written on the subject by adopting a negligence standards of care.[1]

Texas courts in general are in step with the Constitutional requirements for defamation actions. The Court of Civil Appeals in the instant case recognized that a defamation judgment must be supported by evidence of truth-related fault. In fact, the court took great care to set forth the testimony that supported the fault finding by the jury. Appellant's Appendix B-1-9. The court correctly pointed out that the evidence established that Appellee went far beyond the requirement of proving simple negligence by sustaining his burden of proving by a preponderance of the evidence that Appellant maliciously published the complained of libelous material. The factual summary above indicates the type of evidence which supports the conclusion that Appellants published the defamatory material with knowledge of its falsity or

1. States adopting a negligence standard: Cahil v. Hawaiian Paradise Park Court, 543 P.2d 1356 (1975); Troman v. Wood, 340 N.E.2d 292 (1975); Kansas, Goban v. Globe Publishing Company, 531 P.2d (1975); Jacron v. Sindorf, 350 A.2d 688 (1976); Stone v. Essex County Newspapers, Inc., 303 N.E.2d 161 (1975); Thomas H. Maloney & Sons v. E. W. Scripps Co., 334 N.E.2d 494 (1974), cert. den'd, 423 U.S. 883 (1975); Martin v. Griffin Television, Inc., 549 P.2d 85 (Okla. 1976); Tasket v. King Broadcasting Co., 546 P.2d 81 (1976).

a reckless disregard of whether or not it was false. Suffice it to say that the Court of Civil Appeals had ample support in the record when it stated that "the jury was entitled to conclude from the evidence that [Petitioner] made false statements in writing that [Respondent] was a narcotics used when [it] knew better." Appellant's Appendix B-18. Such finding clearly satisfies the requirements of this Court.

Realizing it failed to preserve its error under state procedure and that the malice finding is binding and dispositive of this appeal, Appellant attempts to shift this Court's attention from the malice finding in Special Issue No. 5[2] to the jury finding in Special Issue No. 1.[3] Special Issue No. 1 was an inquiry into whether the ordinary reader would have interpreted the complained of writings as an accusation by Appellant that Appellee was a narcotics addict. Without such a preliminary finding, the fault issue would have been meaningless. Special Issue No. 1 did not attempt to impose strict liability, as claimed by Appellant. The fault issue was Special Issue No. 5. Any discussion on the adequacy of Appellant's objections or lack thereof to the instructions accompanying the fault issue, involves state procedure. The objection to the fault finding was:

2. The jury was asked in Special Issue No. 5: Do you find from a preponderance of the evidence that the Defendant acted with malice in regard to the statements made? Then malice was defined and Appellants failed to properly object to the definition used by the trial court.

3. The jury was asked in Special Issue No. 1 "Do you find from a preponderance of the evidence that the Defendant Railroad stated in writing that Joe Wherry was a narcotics user in violation of Railroad Rule G?

> There is an attempt to impose liability without fault in that no inquiry was made concerning the culpability of the Defendant and culpability or harm is inferred from the term "a narcotics user in violation of Railroad Rule G." Defendants rely in that regard on *Gertz v. Robert Welch, Inc.*, 94 Supreme Court 2997 (1974), Supreme Court of the United States case.

It is obvious that Appellant's objections make no sense as an objection to Special Issue No. 5 or the definition of malice included therein. The objection specifically refers to language that is not even used in that special issue. Texas Rules of Civil Procedure, Rule 274, provides that "a party objecting to a charge must point out *distinctly* the matter to which he objects and the grounds of his objection."

The general legislative commentary to Rule 274 indicates that the rule is designed to promote the reasonable state concern that trial judges be protected "in those cases where they exercise good faith in an effort to discover the defects in the charge, but are unable to do so." The rule gives the trial court a "fair opportunity to correct any error or deficiency." *Osteen v. Crumpton*, 519 S.W.2d 263 (Tex. Civ. App.—1975, err. ref'd.). The trial court was not given a fair opportunity to correct any defect that may have existed in the definition of malice supplied with the fault issue. By its inaction in making a distinct objection to the fault issue, Appellant has waived any right it may have had to complain about the form of the fault issue submission. If Appellant wanted a different definition, it had to tell the court specifically or waive any mistake in the Court's definition.

Similarly, Appellant waived any objection it may have had to the introduction of the Public Law Board Award to the jury. The court below correctly notes that no objection was made at the time of trial to the introduction of the Public Law Board Award. Appellant's Appendix B-23. Texas courts have long recognized that a failure to make a timely objection to proffered evidence prevents a party from complaining that the jury may have considered the evidence. *Pacific Fire Insurance Co. v. Donald*, 217 S.W.2d 431 (Tex. Civ. App.—1949, writ ref'd., n.r.e.); *Shadowins v. Shadowins*, 271 S.W.2d 165 (Tex. Civ. App.—1954, writ ref'd., n.r.e.). The Court of Civil Appeals points out that there was other sufficient evidence of libel in the record from which the jury could have reasonably arrived at its answers to the special issues. Thus, Appellant cannot show that it was harmed by the introduction of the Public Law Board award. Appellant could have avoided introduction of its award by making the proper objection, or asking for an instruction that the jury not consider said evidence. Appellant did neither. Appellant did not even plead absolute privilege in this lawsuit until all parties had rested in open Court. Then, after belatedly pleading absolute privilege, Appellant never requested that the Court give a limiting instruction to the jury directing them not to consider the Public Law Board Award in connection with its determination as to whether Appellants had libeled Appellee. Rule 279 of the Texas Rules of Civil Procedure states in part as follows:

> Failure to submit a definition or explanatory instruction shall not be deemed a ground for reversal of the judgment unless a substantially correct definition or explanatory instruction has been requested

> in writing and tendered by the party complaining of the judgment . . . Upon appeal all independent grounds of recovery or of defense not conclusively established under the evidence and upon which no issue is given or requested shall be deemed as waived . . .

See also First State Bank & Trust Co. of Edinburg v. George, 519 S.W.2d 198 (Tex. Civ. App.—1974, writ ref'd., n.r.e.) If no correct explanatory instruction is requested, there is no predicate laid for consideration on appeal under state law.

APPELLANT RAISES NO SUBSTANTIAL FEDERAL QUESTIONS

As Appellee has previously indicated, Appellant has misstated the current state of Texas law with regard to its argument that libel actions are strict liability actions. Appellant's argument that this case raised the issue of whether the *Gertz* decision applies only to cases involving "media" defendants is equally spurious.

In the instant case, Appellee introduced evidence of actual malice and received a malice finding from the jury.[4]

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4. Since there was a supported malice finding, Appellee has not emphasized the solid reasons for not applying the holding in *Gertz* to cases where there is a non-media defendant. One of the major reasons for such limitation would be that the transcending societal interest in promoting "uninhibited, robust and wide-open" debate on public issues does not exist when a defendant is a non-media defendant. *See* Frakt, *The Evolving Law of Defamation, New York Times v. Sullivan to Gertz v. Robert Welch, Inc., and Beyond,* 6 Rutgers-Camden Law Journal, 471 (1975); Nemmer, *Introduction/Is Freedom of the Press a Redundancy, "What Does it Add to Freedom of Speech?",* 26 Hastings Law Journal, 639 (1975). This court's limiting language in *Gertz* to "publishers and broadcasters" lends currency to the acceptability of media/non-media differentiation.

A close examination of the cases cited by Appellant in its jurisdictional statement reveals that the issue in those cases is clearly not raised here. In the cases relied upon by Appellant, the courts were faced with the question of whether damages could be presumed when negligence served as the standard of liability. *See Jacron Sales Co. v. Sindorf,* 350 A.2d 688 (Maryland, 1976); *Rowe v. Metz,* 564 P.2d 422 (Colo. App. 1977). This court opened the door to presumption of damages where malice is the standard in *Gertz* at

> [T]he states may not permit recovery of presumed or punitive damages at least when liability is not based on a showing of knowledge of falsity or a reckless disregard for the truth.

When there is a finding of malice presumed and punitive damages have been held recoverable by state courts and by federal courts sitting in a diversity action. *Carson v. Allied News Company,* 529 F.2d 206 (7th Cir. 1976); *Davis v. Schuchat,* 510 F.2d 731 (D.C. Cir. 1975).

Although damages can be presumed when malice is shown, Appellee need not rely upon the presumption since evidence of substantial, actual injury was introduced. Appellee testified to the loss of job opportunities that flowed from Appellant's libel and firing. The trial court included injury to character, reputation, mental suffering or anguish and financial injury to Appellee's business or occupation. Appellant failed to object to the efficacy of any of these elements and only claimed evidentiary absence or insufficiency. The Court of Civil Appeals correctly found sufficient evidence to support all three elements of damages. No claim is made that financial injury

is not "actual" damage. In *Gertz* at 349-50, this Court held that it "need not define 'actual injury,' since trial courts have wide experience in framing appropriate jury instructions in tort actions." This Court went on to recognize that out-of-pocket loss was not the only kind of actual injury, but also impairment of reputation and mental anguish and suffering are customary types of actual harm.

SUMMARY

Texas libel law is in accord with constitutional requirements. Any valid objection Appellant may have had to the trial court's definition of actual malice or to the introduction of the Public Law Board Award into evidence was waived by its failure to comply with reasonable, state procedural rules. There were supported findings by the jury that Appellant maliciously libeled Appellee, and that as a result of this libel, Appellee suffered serious, actual injury.

CONCLUSION

For the foregoing reasons, probable jurisdiction should not be noted, and the judgment of the lower court should in all respects be affirmed.

Respectfully submitted,

J. DONALD BOWEN
Attorney for Appellee

CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of November, 1977, three copies of this Reply to Jurisdictional Statement were mailed, by first class mail, postage prepaid, to John D. Gilpin and Osborne J. Dykes III, Fulbright & Jaworski 800 Bank of the Southwest Building, Houston, Texas 77002, counsel for appellant. I further certify that all parties required to be served have been served.

J. DONALD BOWEN